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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of EZEQUIEL PEREZ-HEREDIA and LIANA PEREZ.	
EZEQUIEL PEREZ-HEREDIA, Appellant, v. LIANA R. PEREZ, Respondent.	E069212 (Super.Ct.No. BLD1600020) OPINION

APPEAL from the Superior Court of Riverside County. Mickie E. Reed, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

John L. Dodd & Associates, John L. Dodd and Benjamin Ekenes, for Appellant.

Klueck & Hoppes, Amy E. West and Koryn K. Sheppard for Respondent

Author Pat Conroy once observed, "When mom and dad went to war the only prisoners they took were the children." This case pits father, Ezequiel Perez, Sr., and mother, Liana Perez, who are the parents of three children, E.P., age 17, A.P., age 13, and U.P., age 2, who are subjects of a custody battle in a marital dissolution, against each

other. The dissolution case involved allegations of domestic violence and a restraining order against mother, which resulted in a temporary award of sole custody of the middle child, daughter A.P., and the two-year old developmentally delayed son, U.P., to father. After a custody trial, the court awarded joint legal custody and physical custody of U.P. to both parents, and sole legal and physical custody of A.P. to father. Father appeals only as to the joint award of custody of U.P.

On appeal, father argues (1) the trial court applied the wrong standard in finding mother had "partially" rebutted the presumption of Family Code, section 3044, in awarding mother joint legal custody of U.P.; (2) the trial court erred in considering the opinion testimony of the custody evaluator, whose opinion had changed based on ex parte information received from mother's counsel; (3) the trial court abused discretion by not reviewing and considering the custody evaluator's original report and recommendation; (4) the trial court abused its discretion by overruling father's hearsay objection to case-specific hearsay relied upon by the custody evaluator in forming her opinion. We affirm.

BACKGROUND

Mother and father married in 2000[1], and together had three children: son E.P., born in 2000, daughter A.P., born in 2003, and son U.P., born in 2013. Mother has an adult son, T.H., from a prior relationship, who was not a subject of the lower court proceedings. Both mother and father are registered nurses.

[1] The evaluation conducted by Ms. Carol Bayer, MFT, pursuant to Evidence Code section 730, reflects that the parents married on September 1, 1999.

On April 6, 2016, police responded to the family residence in response to a domestic violence report. Father called police to report that mother had pushed and scratched him during an argument, resulting in her arrest and an emergency restraining order. Father requested that the restraining order also protect daughter A.P. because of a prior incident in which mother threw an object at him in an angry outburst, that struck A.P. unintentionally.

On April 12, 2016, father filed a request for a domestic violence restraining order (DVRO) in Family Law court. The application alleged father was afraid mother would be released from custody and return to continue to fight with him, because she had struck and scratched him previously. Father also alleged that in February of 2016, mother had thrown an object towards father while his back was turned, but hit daughter A.P. instead. And the following month, in March, father alleged that mother had damaged his cell phone and computer. Because daughter A.P., and father's mother, D.P., were fearful of mother, he requested that they be named protected persons under the restraining order. However, because the emergency restraining order was already in effect, the Family Court denied the request for restraining orders pending the hearing.

In the meantime, on April 14, 2016, father filed a petition for dissolution of marriage, requesting sole legal and physical custody of the children. That same date, mother filed a request for order (RFO) seeking child custody, child support, visitation, and spousal support orders. In support of her request, mother alleged that father had called the police and falsely reported domestic violence in order to have mother arrested.

On April 20, 2016, mother filed a response to father's petition for dissolution, and a day later, she responded to father's request for a DVRO, alleging that the scratches on father were self-inflicted and denied any other acts of violence. Mother alleged that on the date of her arrest, father had announced he was moving out and threatened that he would make sure she did not "get his kids." Nevertheless, after taking mother into custody, police photographed her hands and body, which showed no signs of a struggle.[2] Mother further alleged that after her arrest, father moved out of the residence, taking the two youngest children, A.P. and U.P., leaving E.P. alone in the residence, asleep in an unlocked house.

On the date set for the hearing on father's request for a DVRO, father filed a responsive declaration to mother's request for order, this time claiming that mother was bipolar. At the hearing, all three children testified, with T.H. and E.P. testifying for mother, while the daughter, A.P., testified for father. After hearing testimony, the court issued a DVRO against mother for one year, naming as protected persons father, father's mother D.P., and daughter A.P. The court directed the parties to return June 9, 2016, to determine whether mother needed a 52-week batterer's program, and ordered stay-away and no-contact orders vis-à-vis the protected persons pending that hearing. However, the court did authorize peaceful written contact through the parties' attorneys. The court awarded temporary custody of A.P. and U.P. to father, with visitation each Saturday for

[2] A child abuse investigation was undertaken by Child Protective Services, but it was closed as unfounded. Criminal charges were dismissed.

mother and U.P. between 9:00 a.m. and 5:00 p.m. The DVRO would remain in effect until April 28, 2017.

On June 9, 2016, the court ordered both parties to attend child custody recommending counseling (CCRC), and a hearing on mother's RFO was set for August 5, 2016. Prior to the hearing, father submitted a supplemental declaration by 13-year old A.P., stating she had told the truth at the hearing on father's request for a DVRO when she testified about mother losing her temper and throwing things. A.P. stated her mother had not spoken[3] to her since the hearing, and that she did not want to live with her mother. In addition, father filed his own supplemental declaration, stating that mother was spreading lies about him having a child with another woman.

On August 5, 2016, after the parties had met with the CCRC counselor, the court heard and granted mother's RFO. The court found good cause to overcome the presumption under Family Code section 3044, and pursuant to the CCRC recommendation, it awarded joint legal custody of son E.P. to both parents, with physical custody awarded to mother, and awarded father temporary sole legal and physical custody of 13-year old A.P. and 2-year old U.P. pending further hearing. The court appointed Dr. Brian Wexler pursuant to section 730 of the Evidence Code to conduct a custody evaluation, including psychological testing of the parents, and set a further hearing date to review the Evidence Code section 730 evaluation.

[3] The DVRO prohibited direct contact.

Respecting parenting time, mother's visits with A.P. were ordered to take place in the context of counseling, and her visits with U.P. were scheduled for every weekend from 6:00 p.m. Friday until 6:00 p.m. Sunday. Mother's parenting time would change to week-on, week-off custody for the summer. The court also directed mother to enroll in a 52-week domestic violence program.

On October 5, 1016, the court appointed Carol Bayer, MFT, as the Evidence Code section 730 evaluator. The parties stipulated that the report of the evaluation would be admitted into evidence, subject to cross-examination, without objection. The focus of the evaluation related to the two children alienated from respective parents, as well as allegations of child abuse and neglect.

The child custody evaluator met with the parties and their children, and interviewed numerous witnesses. At mother's request, the progress hearing on the domestic violence program was set to coincide with the hearing on the return of the Evidence Code section 730 evaluation.

On April 26, 2017, as the DVRO was set to expire, father filed a request to renew the order. He attached a declaration alleging that mother had called the police to report that A.P. was suicidal and that she had taken U.P. for medical evaluation of suspected burns, which were, instead, insect bites. Son E.P. was used as the conduit for this information. Father also alleged that purchases had been made from "provocative web services" using his credentials and credit cards, resulting in the delivery of pornographic magazines to his home, causing him to change his credit cards. Additionally, father

reported that his family had seen mother driving around their neighborhood and going past their house. Finally, father's car had been vandalized both at work and at home[4] and he suspected mother was the culprit.

Mother responded, denying all the allegations as false. Mother denied having any access to bank accounts or credit cards in father's name, or his email accounts; father had closed the joint checking account before making the false domestic violence allegations in April 2016. Mother denied driving by father's home or stalking him at work or at home, although she claimed father had shown up, unannounced, at her residence. Regarding the vandalism of father's car, mother pointed out it would have been impossible for her to vandalize his car at work because he worked at a state prison where the parking area is restricted, and she asserted the other allegations of vandalism were fabricated.

Regarding A.P.'s suicidal gesture, mother explained that the mother of A.P.'s boyfriend had found text messages from A.P. on her son's phone expressing an intention of cutting herself because he could not date her. Father had attempted to use some of the text messages, taken out of context, to make it appear that A.P. was suicidal due to mother's treatment of her. In response to the allegations relating to U.P., mother

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[4] Father alleged that, on one occasion, grease and feces were placed on the vehicle's door handles, and spoiled fish and milk were placed in the back of his truck. On another occasion, while dropping off U.P. for mother's visitation, father approached mother's boyfriend, shook his hand and wished him luck with their relationship. The following Monday, when father came home from work, he found the words "Good Luck" scratched on the driver's side door of his truck.

explained that she saw that his arm was blistered and excoriated at the time of the visitation exchange, which took place at the police station, so she took him in to the police station to have someone see the blisters in order to prevent father from accusing her of causing the injuries. Further, when she took U.P. for a medical evaluation of the blisters, he was diagnosed with herpes zoster, against which father had refused to have him vaccinated, and for which mother obtained an antibiotic for treatment.[5]

On April 26, 2017, the court extended the personal conduct and stay away orders but ordered custody and visitation in conformance with the prior orders dated August 5, 2016, based on the CCRC recommendation. The court also ordered the parents to utilize TalkingParents.com to communicate, as recommended in the CCRC report. That same date, mother submitted her 52-week domestic violence progress report which noted mother was actively participating in the program.

The Evidence Code section 730 evaluation report was prepared on March 9, 2017. The summary of recommendations included joint legal custody of all three children to both parents, with father to be the primary custodial parent of A.P. and U.P., while mother was to be the primary custodial parent of E.P. The recommendation provided mother would have custodial time with U.P. from 6:00 p.m. Friday evening until Monday morning at 8:00 a.m. three weekends per month. The report also recommended that E.P. be encouraged to have visitation with his father two weekends per month, at E.P.'s

[5] Although father alleged that U.P. had a condition rendering him excessively sensitive to insect bites, no evidence of an actual medical diagnosis was provided.

discretion, and that mother and A.P. should begin weekly counseling to improve their communication, with no forced visitation.

The report noted that father felt he was the best person to parent the children because he had been the primary parent, mother had abused A.P. and did not appreciate U.P.'s developmental delays. Father unilaterally had U.P. evaluated without telling mother and had not involved her in the child's therapy up to the date of the court trial. Father could find nothing positive to say about mother's parenting. And whereas mother had reached out to father to work out a shared custody arrangement, father sought to limit mother's contact with U.P. to supervised visits.

The evaluator concluded mother is loving but emotionally reactive. Ms. Bayer viewed a video of a verbal exchange between mother and father into which A.P. had intervened, where father withdrew but mother continued making negative comments to father and A.P. The evaluator expressed hope that mother was learning how to manage anger in the domestic violence program. Nevertheless, the report noted that U.P. was equally bonded to both parents. The evaluator also commented that there was no evidence of abuse to the children.

Attached to the custody evaluation were the psychological evaluations of the parents conducted by Dr. Jones.[6] As to mother, the psychological testing revealed that she presented herself in an idealistic and somewhat unrealistic way, like the average child

[6] The record does not reveal when Dr. Jones was appointed or what happened to the appointment of Dr. Wexler, who was originally appointed to conduct the custody evaluation.

custody litigant. It also revealed that she tends to be emotionally controlled most of the time but has the capacity for angry outbursts under sufficient stress. Additionally, she represses feelings and lacks awareness of how she may upset others but shows an average level of possible temper control problems compared with other child custody litigants. However, she showed a somewhat higher potential for antisocial conduct and less ability to provide dependable emotional bonding than other custody litigants.

For his part, the psychological evaluation indicated father was very defensive in tests, minimizing even minor issues. He emerged from the tests as being rigid and compulsive in his thinking and behavior but likely to conform to rules. Findings suggested he would not alienate the affections of his children for their mother, but he had limited psychological insight.[7] There were no indications of serious emotional disturbance or psychotic functioning.

The court trial on the custody issue commenced on July 25, 2017, with an oral motion by father's counsel to exempt the Evidence Code section 730 custody evaluator, Ms. Bayer, from the order excluding witnesses, so that she could remain in the courtroom to hear other witnesses testify. Mother's counsel did not object.

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[7] Interestingly, during the Evidence Code section 730 evaluation process, while father expressed concern that mother would alienate E.P. against him, Ms. Bayer noted that father ignored E.P.'s denials that mother so attempted. Additionally, the evaluator commented that A.P. was more aware of the ongoing proceedings than was advisable, suggesting that father was discussing the case with her. Further, son E.P. complained that father had not responded to any attempts at communication from either T.H. or E.P.

Numerous witnesses were called over the course of three days. Among the witnesses was Dr. Stephanie Rosales, a school psychologist who provides behavioral services for children with developmental disorders, including autism spectrum disorders. Father had unilaterally taken U.P. for an assessment without telling mother or engaging her in the services, and father told Dr. Rosales he was unsure if mother would participate. Dr. Rosales's testimony was offered to show what needs to be included in the parents' home in order for U.P. to benefit from services, because services take place in the parents' home. Dr. Rosales testified that while the background information indicated only that U.P. was developmentally delayed, and had health issues at birth,[8] a recent concern was the indication of behaviors consistent with autism spectrum disorder. She observed that U.P. did not direct functional communication with others, although he could repeat something heard in his environment, and mother reported that he communicated in short sentences with her.

Dr. Rosales indicated that children with developmental delays or autism do better with a consistent schedule. Dr. Rosales had never met mother before, had no reason to believe that mother would not be able to participate in therapeutic services, and she had no problem providing services to U.P. in the mother's home, although father had

[8] U.P. was born with a condition called plagiocephaly, a malformation of the skull producing the appearance of a twisted and lopsided head, caused by irregular closure of the cranial sutures. (Taber's Cyclopedic Medical Dictionary, Edition 20 (2005), p. 1679.) It is also called "flat head syndrome" for which U.P. wore a "DOC" band to mold the skull into shape.

informed her that he was not sure mother would participate. In her treatment of U.P., Dr. Rosales had not observed any regression, although U.P. would have tantrums if he did not get what he wanted. Dr. Rosales explained that while plenty of three-year-olds have tantrums, U.P.'s tantrums were persistent.[9]

Ms. Carol Bayer, the Evidence Code section 730 custody evaluator, also testified at the hearing, having been called as a witness by father. Shortly after Ms. Bayer had mailed the report, father emailed her with additional information about collateral witnesses. The original recommendation, contained in her report, had been for mother to have weekend visitation on alternating weekends, based on the schedule as it had existed prior the August 5, 2016 order modifying the schedule for the summer.

However, a few days prior to the hearing, Ms. Bayer was informed by mother's counsel in a telephone call that mother had been having week-on, week-off visitation, which was going well. The evaluator then contacted father's counsel to inform her that the recommendation would be modified, which father's counsel acknowledged at the inception of the hearing. Ms. Bayer viewed the domestic violence allegations as a "he-said, she-said" situation, because the two older sons, who were present, denied any domestic violence occurred, and considered the scratches to be self-inflicted, whereas father and A.P. averred that it did. In Ms. Bayer's opinion, mother did not pose any danger to U.P.

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[9] Given that Dr. Rosales had not met mother previously nor provided treatments for U.P. in mother's home, these tantrums would have occurred in father's home.

Ms. Bayer re-affirmed her recommendation that legal custody of all three children be joint. As to E.P., she believed he should live with mother primarily and have visitation with father and therapy. As to A.P., she recommended a step-up plan so mother and A.P. could develop a relationship. As to U.P., Ms. Bayer recommended joint legal and joint physical custody, on a continued week-on, week-off schedule.

The court also heard testimony of the mother and father, as well as father's mother, A.P., E.P., and other collateral witnesses. Where relevant, the testimony will be addressed in the Discussion section of this opinion. Of note is the fact that after calling the custody evaluator as his own witness, and acknowledging awareness that the recommendation had changed at the beginning of trial, father made a motion to strike Ms. Bayer's testimony during closing arguments due to the ex parte communication from mother's counsel, although father's counsel was aware of Ms. Bayer's changed recommendation prior to the trial, where Mr. Bayer was called as father's expert. The court denied this request as untimely and because Ms. Bayer was father's own witness.

After arguments, the court found it was in the best interests of the children to find that the presumption under Family Code section 3044 was rebutted, "to some extent." The court found that mother had completed most of the domestic violence classes, was not on probation or parole, and did not have a criminal conviction. The court ordered joint legal custody of E.P. and U.P. to both parents. The court awarded sole legal and physical custody of A.P. to father, with visitation for mother in a therapeutic setting. The

court awarded sole physical custody of E.P. to mother. As to U.P., the court awarded shared physical custody according to a schedule, along with other orders.

Father appealed.

DISCUSSION

Father makes a number of related claims, under separate headings, challenging the order awarding joint legal custody of U.P. to both parents, with shared physical custody.

1. *There Was No Abuse of Discretion in Awarding Joint Legal and Physical Custody of U.P. to Both Parents.*

Father challenges only the custody order relating to U.P., arguing that the trial court abused its discretion in awarding joint legal custody of the child where mother had only "partially" rebutted the presumption found in Family Code section 3044, thereby applying the wrong legal standard. In doing so, father raises several related issues challenging the court's consideration of Ms. Bayer's modified recommendation which was based on "unverified assertions" made during an improper ex parte communication, that the court erroneously failed to consider the original Evidence Code section 730 evaluation report, and that the court erred in overruling father's objection to hearsay contained in the evaluator's report. We disagree.

a. *Standard of Review*

On appellate review, a judgment or order of the lower court is presumed correct (*In re Marriage of Marshall* (2018) 23 Cal.App.5th 477, 483; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822), and it is presumed that the court regularly

performed its duty by understanding and applying the law correctly. (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 333; *In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 653; Evid. Code, § 664.) Because trial courts have great discretion in fashioning child custody and visitation orders we review those orders for an abuse of discretion. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497.)

In determining whether the court properly exercised its discretion, we review the trial court's factual findings for substantial evidence, in the light most favorable to the judgment. (*In re Marriage of Fajota, supra,* 230 Cal.App.4th at p. 1497; see also, *Celia S. v. Hugo H*. (2016) 3 Cal.App.5th 655, 662.) "'The trial judge, having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony.'" (*Heidi S. v. David H*. (2016) 1 Cal.App.5th 1150, 1163, quoting *In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1492.)

A court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child, or if it applies improper criteria or makes incorrect legal assumptions. (*In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at p. 1497.) An abuse of discretion occurs when the trial court exceeds the bounds of reason, such that we would uphold the decision so long as it is reasonable, even if we disagree with the trial court's determination. (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 334.) "We do not

reverse unless a trial court's determination is arbitrary, capricious, or patently absurd." (*Heidi S. v. David H., supra,* 1 Cal.App.5th at p. 1163.)

b. *The Court Properly Found that the Presumption Under Family Code Section 3044 Had Been Rebutted.*

Family Code section 3044 provides in relevant part: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence."

Subdivision (b), of Family Code section 3044, sets out the factors a court may consider in determining whether the presumption has been rebutted. Those factors include that the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interests of the child pursuant to Family Code sections 3011 and 3020 (Fam. Code § 3044, subd. (b)(1)), and the completion of a batterer's treatment program as outlined in subdivision (c) of section 1203.097 of the Penal Code (Fam. Code, § 3044, subd. (b)(2)(A)), among other factors.

The Family Code section 3044 presumption does not change the best interest test, nor supplant other Family Code provisions governing custody proceedings. The presumption may be overcome by a preponderance of the evidence showing that it is in the child's best interest to grant joint or sole custody to the offending parent. (Fam. Code, § 3044, subd. (b)(1); *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055.)

The presumption set forth in Family Code section 3044 shifts to the perpetrator the burden of persuasion that an award of custody to her would not be detrimental to the best interests of the child. It does not establish a presumption for or against joint custody. (*S.Y. v. Superior Court, supra,* 29 Cal.App.5th at p. 334.) The paramount factor for custody of the child is the child's health, safety, and welfare. (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055; Fam. Code, §§ 3020, subd. (a), 3040, subd. (b).) Thus, while the factors set forth in Family Code section 3044 must be considered, they are not mandatory requirements for rebuttal of the presumption. (*S.Y. v Superior Court, supra,* at p. 335.)

Indeed, as the court in *S.Y.* reasoned, sometimes certain factors are not in play. (*S.Y. v. Superior Court, supra,* 29 Cal.App.5th at p. 335.) In such situations, the trial court need only provide sufficient reasons to permit meaningful appellate review. (*Ibid.*) In other words, there is no requirement that a parent confronting Family Code section 3044 make a specific showing on any or all the listed factors, or that the trial court expressly refer to them in order to rebut the presumption. To rebut the presumption, it

was mother's burden to show, by a preponderance of the evidence, that joint or sole custody to her would not be detrimental to U.P.'s best interest. (*S.Y. v. Superior Court, supra,* 29 Cal.App.5th at p. 334, citing *Jason P. v. Danielle S*. (2017) 9 Cal.App.5th 1000, 1026, 1031, fn. 22.)

There was ample evidence presented as to the first statutory factor to be considered in determining whether the presumption has been rebutted, which is the best interest of the child, without using the preference for frequent and continuing contact with both parents to rebut the presumption of detriment. (Fam. Code, § 3044, subd. (b)(1); *S.Y. v. Superior Court, supra,* 29 Cal.App.5th at p. 336.) "The best interest of the child is always the overriding goal, and when there has been domestic abuse, the health, safety, and welfare of the child is the controlling factor." (Fam. Code, § 3020, subd. (c); *S.Y. v. Superior Court, supra,* 29 Cal.App.5th at p. 336.) The Family Code section 3044 presumption does not change that test and does not limit the evidence cognizable by the court. (*Keith R. v. Superior Court, supra,* 174 Cal.App.4th at pp. 1054–1055.)

Here, the evaluator's opinion was that mother posed no risk to U.P. and that shared parenting time was in his best interests. It must be recalled that the court had already made a finding — without qualification — that there was good cause to overcome the Family Code section 3044 presumption in 2016.

The evidence that joint physical and legal custody of U.P. was in the best interests of the child satisfied mother's burden of proving that paragraph (1) of subdivision (b) of Family Code section 3044 had been met. Because there is no requirement that mother

prove the existence of each of the statutory factors, this evidence satisfied her burden of proving by a preponderance that the presumption should again be rebutted. In addition, the court found mother had nearly completed the domestic violence program by the date of the hearing, an additional factor under subparagraph (2) of subdivision (b) of Family Code section 3044. Given the evidence that U.P. was well-bonded and comfortable with mother, and the evaluator's opinion that mother did not pose a danger to U.P., the record supports the trial court's finding that the presumption was rebutted and its discretionary exercise of awarding joint legal and physical custody of U.P.

The court did find that mother had not yet completed the batterer's program and that there had been a further act of violence by destroying personal property (vandalism of father's car). This act apparently took place in March 2017, before the DVRO was extended.[10] While father attempts to characterize the trial court's findings as determining that the presumption was only "partially" rebutted, this is a misleading attempt to parse the court's ruling. The court expressly ruled that joint legal and physical custody of U.P. would not be detrimental in ruling it was in the children's best interests to deem the presumption rebutted. This alone satisfies the requisite basis for the court's ruling.

The court's comments that the presumption had been rebutted "to some extent," were not in reference to the quantum of proof, but, rather, were in reference to the

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[10] Mother stated in her response to father's request to renew the DVRO that the father had approached her car and made the negative comment to her passenger, a correctional officer named Manuel Saenz, wishing him "luck with her." The court found that the vandalism of father's car, consisting of the words "good luck" scratched on his car, was the result of father's comment. The DVRO was renewed on June 29, 2017.

additional statutory factors, contained in Family Code section 3044, subdivision (b)(2), insofar as mother had not completed the batterer's program, had vandalized father's car, and had problems controlling her anger, for which she was already going to classes and therapy. While these were factors for the court to consider, they did not compel a finding that mother failed to rebut the presumption.

In fact, the court's comments on father's attempts to put negative ideas about mother into U.P.'s mind, causing the child to cry at a visitation exchange, influenced its decision, as did the fact the car damage was precipitated by father's statement to mother, which the court did not "think was good for [father] to say," where the court knew father wasn't "saying it in a nice way." In any event, the court's comment that the presumption was rebutted "to an extent" does not compel a different result; we review the court's decision and judgment, not the reasons. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d. 643, 647-648; see also *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633.)

In combination with evidence that joint custody would not be detrimental to U.P., the court's findings that the presumption had been rebutted are supported by the record, and the decision was a proper exercise of discretion.

c. *Absent a Timely Objection by Father, the Court Properly Considered the Opinion of the Custody Evaluation of His Own Witness.*

Father argues that the court improperly considered Ms. Bayer's testimony about her changed recommendation regarding the custody of U.P. due to an improper ex parte communication between mother's counsel and the evaluator. We disagree.

First, we find that any error was invited by father, who called Ms. Bayer as his own expert witness after already being informed of the changed recommendation. The record shows that while mother's counsel contacted the evaluator to inform the latter that mother now had week-on and week-off visitation, and that it was going well, the evaluator then informed both counsel before the hearing that her recommendation had changed. The witness also spoke to father in the waiting area of the court about the current visitation schedule, and father told her, also ex parte, he did not think it was going well.

Having offered the testimony of the custody expert as his own witness after learning of the changed recommendation, the error was invited. (See *San Mateo Union High School v. County of San Mateo* (2013) 213 Cal.App.4th 418, [where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal]; see also, *In re Marriage of Rodriguez* (2018) 23 Cal.App.5th 625, 638 [an order will not be disturbed on an appeal prosecuted by a consenting party].)

Second, the objection to father's own witness's testimony, made after she had testified at length, was untimely. (Evid. Code, § 353, subd. (a); *SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 563 [appellant failed to object to measure of damages introduced at trial until after trial ended].)

Compounding the problem is the fact father requested that the trial court consider the previously prepared report of the evaluation as the sole basis for the court's decision, even though the trial court had been made aware that the evaluator no longer recommended that result.

We acknowledge that ex parte communication between the evaluator and mother's counsel was improper. (Cal. Rules of Ct., rule 5.235.) However, the erroneous basis for the original recommendation, that is, the misinformation about mother's current visitation schedule, would have been elicited during her testimony anyway. Mother's counsel cross-examined her at length, adducing information that mother's parenting time had been modified by an order made subsequent to the one that had been provided when the Evidence Code section 730 appointment had been made, setting out a different schedule for the summer. The information would have inevitably come to light, and the recommendation would have changed, with or without the ex parte communication.

Having presented the expert's testimony in his own case in chief, father cannot now complain that the opinion dissatisfied him.

d. *The Trial Court Properly Considered the Report of the Child Custody Evaluation.*

Father argues that the trial court failed to properly consider the original report filed and submitted by the child custody evaluator. We disagree.

Father points to the fact that during arguments, in which father's counsel brought up the opinion of Dr. Jones regarding his psychological evaluation of mother, the court

indicated that he could not consider it because the report had not been introduced into evidence. The court stated it was waiting for someone to address "those psychological findings but nobody did." Father's counsel then informed the court that the parties had stipulated to the admissibility of the report, and the court took the time to locate the stipulation. The arguments then resumed, and afterwards the court ruled.

The trial court's reference to "those findings," indicates it was already familiar with Ms. Bayer's report as well as the appended psychological reports of both parents. Father points to no indication in the record supporting the assertion that the court did not consider all the materials in the file, except that the court ruled shortly after arguments concluded. However, the court's comments show it was familiar with "those findings," and we are required to presume that the trial court discharged its duty. (Evid. Code, § 664.)

The fact that the trial court did not expressly refer to certain findings in the psychological evaluation of mother is not determinative. While father wanted the court to focus on mother's temper and her lack of appreciation for how she may upset others, the conclusion was that she showed an "average level of possible temper control problems, compared to other child custody litigants." The same psychologist found father lacked awareness of how he would upset or provoke others, and that his highest score was on the Lie Scale. Reviewing it in greater depth would not inure to father's benefit.

Having failed to rebut the presumption that the court discharged its duty by reviewing the report, there is no error.

e. *The Court Did Not Err in Overruling Father's Hearsay Objections to Hearsay in the Evaluator's Report.*

During trial, mother's counsel asked Ms. Bayer, the child custody expert called to the stand by father, about information obtained during a collateral contact with Ms. Jacqueline Fisher, the marriage and family therapist, regarding mother's participation in her domestic violence program. Father objected on the ground the information constituted testimonial hearsay, but the court overruled the objection. Ms. Bayer testified that Ms. Fisher reported mother had participated in the group program and was not a danger to any of the parties in the case. Father again objected that the testimony was inadmissible double hearsay, but the court again overruled the objection.

On appeal, father argues the court's ruling was prejudicial error within the meaning of the California Supreme Court's holding in *People v. Sanchez* (2016) 63 Cal.4th 665, and *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501. We disagree. The challenged hearsay does not implicate confrontation rights, so we apply the abuse of discretion standard of review in determining whether the admission of hearsay in the form of the expert's testimony was error. (*People v. Clark* (2016) 63 Cal.4th 522, 590.)

In *People v. Sanchez* the California Supreme Court held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are

hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing." (*People v. Sanchez, supra,* 63 Cal.4th at p. 686.)

Sanchez also acknowledged that an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury in *general terms* that he did so," but an expert may not relate "case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*People v. Sanchez, supra,* 63 Cal.4th at pp. 685-686.) "Case-specific facts" are those relating to the particular events and participants alleged to have been involved in the case being tried. (*Id*. at p. 676.)

Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay,* as the high court defines that term." (*People v. Sanchez, supra,* 63 Cal.4th at p. 680.)

To determine whether *Sanchez* applies in this case, we examine the principles applicable to expert testimony. Evidence Code section 801, governing expert testimony applies in civil cases as well as criminal cases. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 405, fn.6.) Thus, in *Burroughs*, the court agreed that *Sanchez* applied in sexually violent predator proceedings (Welf. & Inst. Code, §§ 6600, et seq.), where a defendant is afforded many of the protections available to criminal defendants, such as the right to confrontation. (*Burroughs*, *supra*, at pp. 383-384.) With no relevant guidance in the body of law governing review of child custody decisions, we assume without deciding that *Sanchez* is applicable here where child custody is a fundamental right. (See *Stanley v. Illinois* (1972) 405 U.S. 645, 651.) However, that does not resolve the issue.

The first question is whether the objectionable testimony related to "case specific facts." Here the domestic violence incident gave rise to the custody fight, and served as the basis for father's claim that mother should not have joint custody of U.P. However, the testimony of the evaluator was not offered to prove that mother committed the act of domestic violence, so it was unrelated to the facts or events surrounding the incident that gave rise to the DVRO. Instead, the testimony related to mother's progress in the 52-week domestic violence treatment program and whether mother currently is a danger to her child. The testimony was not "case specific" so the hearsay was not testimonial hearsay.

Even if it were testimonial, *Sanchez* only proscribes the admission of testimonial hearsay unless it has been independently proven by competent evidence or covered by a hearsay exception. (*People v. Sanchez, supra,* 63 Cal.4th at p. 686.) Here, the progress reports of the domestic violence therapist, Ms. Fisher, were filed in the action without objection, as required by the terms of the DVRO. The progress report corroborated the expert testimony by indicating no level of risk of recidivism. Additionally, Ms. Bayer's summary of her collateral contact with Ms. Fisher is included in the custody evaluation report, which was filed with the court by stipulation and deemed admissible without any hearsay objection.

Finally, *Sanchez* is an application of the confrontation clause decision in *Crawford v. Washington* (2004) 541 U.S. 36. The Confrontation Clause is a federal constitutional protection for persons accused of crime. (U.S. Const., Sixth Amend.) Father is not accused of anything. He cannot raise an objection that Ms. Bayer's testimony constitutes testimonial hearsay because he has not identified a confrontation right, and thus no standing, to challenge the admission of "testimonial" evidence relating to mother's participation in her domestic violence program.

Further, having agreed to the admissibility of Ms. Bayer's report, which contained hearsay statements of Ms. Fisher, and having failed to object to Ms. Fisher's progress report, father has forfeited any objection to hearsay attributed to Ms. Fisher contained in any documents filed in the action.

The court correctly ruled there was no testimonial hearsay here. This brings us full circle to Evidence Code section 802. Even after the holding in *Sanchez,* an expert is authorized to testify as to the basis of his or her opinion and the matter on which it is based, even if it is hearsay. (Evid. Code, § 802; *People v. Sanchez, supra*, 63 Cal.4th at p. 685.) Here, Ms. Bayer contacted Ms. Fisher in evaluating whether mother posed a risk of harm to U.P., and recommended joint legal and physical custody of U.P. based on the information received from Ms. Fisher. As an expert, Ms. Bayer was allowed to rely on hearsay in forming her opinion.

The court did not abuse its discretion in admitting the hearsay statements.

DISPOSITION

The judgment is affirmed. Father is ordered to pay costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.